

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>89-11654</u>
JOHN PETERS)	
d/b/a EAST TRUCKING)	FILED
)	at 2 o'clock & 00 min P.M.
Debtor)	Date 5-18-90
)	
JOHN PETERS)	
d/b/a EAST TRUCKING)	
)	Adversary Proceeding
Plaintiff)	Number <u>89-1087</u>
)	
vs.)	
)	
FERRY PASS WRECKER SERVICE)	
)	
Defendant)	

ORDER

On November 20, 1989 John H. Peters, d/b/a East Trucking then debtor-in-possession while the underlying case was a Chapter 11 proceeding filed this adversary proceeding against Ferry Pass Wrecker Service. By correspondence from the Clerk of this Court dated December 5, 1989 the summons and notice of trial was forwarded to Mr. Geary, plaintiff's attorney of record. The clerk's correspondence required plaintiff's counsel to perfect service of the complaint with the summons and notice of trial upon defendant within ten (10) days of the summons' issuance. The summons and notice of trial issued by the clerk was dated December 5, 1989

signed by deputy clerk, Beverly J. Aikens with the seal of the court affixed and established February 12, 1990 at 9:00 a.m., Suite 150 827 Telfair Street, Augusta, Georgia as the date, time and place for trial.

On December 8, 1989 a certificate of service was filed certifying service of the summons and copy of the complaint on December 8, 1989 upon Ferry Pass Wrecker Service. On February 9, 1990 Mr. Geary filed an affidavit which stated:

Affidavit for Entry of Default Judgment

Comes now, M. E. Geary, attorney for John Peters, d/b/a East Trucking, plaintiff in the above entitled action ad filed this his affidavit for entry of default judgment by stating the following:

1. The summons was issued on December 5, 1989 on the above referenced adversary.
2. The deadline for filing an answer was thirty five (35) days after the date the summons was issued (i.e., January 9, 1990).
3. Service was made on the defendant, Ferry Pass Wrecker Service, by regular first class United States mail, postage fully pre-paid, addressed to the defendant at 725 E. Olive Road, Pensacola, Fl 32514 on December 8, 1989.
4. Pursuant to Rule 5 of the Federal Rules of Civil Procedure, attorney for the plaintiff, on behalf of said plaintiff, does hereby certify that service of the adversary proceedings was performed by Kellie Wiggins of the law firm of M.E. Geary, P.C. as stated in the certificate of service filed with the court on December 8, 1989 (copy attached).
5. Defensive pleadings have not been received within the time limit fixed by Bankruptcy Rule 7012(a).
6. Defendant is not in the military service.

So certified on February 8, 1990.

S/ Gene Geary

GENE GEARY

M.E. GEARY, P.C.

Ga. State Bar. No. 288525

On February 13, 1990, the plaintiff through Mr. Geary, brought a motion for entry of default based upon the affidavit. On February 16, 1990 the clerk entered default against defendant and as evidenced by certificate of mailing of the same date, served the defendant with notice of the entry of default. ON February 27, 1990 plaintiff through Mr. Geary, moved for entry of default judgment. In response to the filing of the motion, the clerk issued a notice of hearing on the motion for May 14, 1990 at 9:00 a.m. at the United States Bankruptcy Court, 827 Telfair Street, Augusta, Georgia. The notice was dated April 3, 1990 and, as evidenced by the clerk's certificate of mailing, the defendant was served.

At hearing on the motion for entry of default judgment, Mr. Frank Allen appeared on behalf of Mr. Geary for the plaintiff. Mr. Edward J. Coleman appeared for the Chapter 7 trustee, Mr. James D. Walker, Jr., Mrs. Jean Hartman and Mr. J.B. Hartman, principals of Ferry Pass Wrecker Service appeared and disputed default. From the evidence presented at hearing, the summons and notice of trial served upon the defendant, Ferry Pass Wrecker Service as not the summons and notice of trial issued by the clerk. The summons and notice of trial served did not reflect a date of issuance, did not contain the signature of the deputy clerk, did not evidence the seal of the court and did not set forth the date time and place of trial.

The plaintiff having failed to perfect service of the summons as issued by the clerk, service of process is defective. The motion for the entry of default judgment is ORDERED denied.

Further ORDERED that the entry of default by the clerk is vacated.

The clerk shall issue a notice to plaintiff's counsel, Mr. Geary, to appear and show cause why this court should not impose sanctions upon him pursuant to Bankruptcy Rule 9011. In addition to plaintiff's counsel, the clerk shall serve the defendant with the notice of hearing. Prior to hearing, the defendant, through one of its principals appearing at hearing on May 14, 1990 may file an affidavit setting forth the expenses incurred by them in appearing at the hearing on the motion for entry of default. The affidavit may include expenses for meals, lodging and travel. Attendance of Ferry Pass Wrecker Service through its principals is not required at the show cause hearing.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 18th day of May, 1990.